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**UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS**

<b>MCELROY METAL MILL, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-4032-JAR</b>
	)	
<b>SAFECO INSURANCE COMPANY</b>	)	
<b>OF AMERICA,</b>	)	
<b>KANSAS BUILDING SYSTEMS, INC.,</b>	)	
<b>POTTS CONTRACTING GROUP, INC.,</b>	)	
<b>and R. A. POTTS,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

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**MEMORANDUM ORDER AND OPINION**  
**GRANTING IN PART AND DENYING IN PART DEFENDANTS**  
**KANSAS BUILDING SYSTEMS, INC.’S AND SAFECO INSURANCE COMPANY OF**  
**AMERICA’S MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on defendants, Kansas Building Systems, Inc.’s (“KBS”), and SAFECO Insurance Company of America’s (“SAFECO”), motion for summary judgment (Doc. 62). These defendants move for summary judgment on three sets of claims: (1) KBS’ cross-claims against defendant Potts Contracting Group, Inc. (“Potts Contracting”); (2) Potts Contracting’s cross-claims against KBS; and (3) plaintiff’s claim against KBS and SAFECO.<sup>1</sup> For the reasons below, defendants’ motion for summary judgment is granted in part and denied in part.

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<sup>1</sup>In their motion for summary judgment, KBS and SAFECO ask for summary judgment on plaintiff’s claim against KBS. (Doc. 62 at 1.) However, KBS and SAFECO do not address why summary judgment should be granted in their favor against plaintiff in their memorandum in support of their motion. (Doc. 63.) Instead, they refer only to the pending cross-claims. Nevertheless, the Court will construe KBS’ and SAFECO’s motion as requesting summary judgment on plaintiff’s claim against them for breach of payment bond.

## **I. Uncontroverted Facts**

This is a civil action arising under the Miller Act<sup>2</sup> involving a dispute between a general contractor on a U.S. Government contract (KBS), its surety (SAFECO), a subcontractor (Potts Contracting), its guarantor (Mr. R.A. Potts), and a supplier (McElroy Metal Mill, Inc., hereinafter “McElroy Metal”) for materials that were supplied by McElroy Metal for the renovation of a Kansas Army National Guard aircraft hangar at Forbes Field, Topeka, Kansas (“Forbes Field Project”), and for payment of these materials.

For the most part, the facts are undisputed. KBS, as general contractor on the Forbes Field Project, entered into a subcontract with Potts Contracting for the installation of wall and roof panels in the renovation of the aircraft hangar. The subcontract requires Potts Contracting to furnish all necessary materials as specified in the plans and specifications and to warrant its work against all defects in material.<sup>3</sup> Further, under the subcontract, Potts Contracting agrees to assume all of the obligations and responsibilities that KBS assumes toward the owner.<sup>4</sup>

Additionally, the subcontract between KBS and Potts Contracting contains the following clause:

The Subcontractor agrees to promptly pay when due for all labor, equipment, materials, and supplies used or consumed in completing this contract and to indemnify and hold harmless the Contractor from any claim, lien, judgment, court costs and expenses incurred on account of Subcontractor’s failure to comply with the terms of this contract.<sup>5</sup>

The specifications for the project require G-90 galvanized steel for the roof and wall panels.

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<sup>2</sup>40 U.S.C. § 3131–3134.

<sup>3</sup>(Doc. 63, Ex. A at ¶¶ 1.1, 1.5.)

<sup>4</sup>(Doc. 63, Ex. A at ¶ 1.2.)

<sup>5</sup>(Doc. 63, Ex. A at ¶ 1.7.)

Further, the specifications require that any substitutions to the required materials be submitted and approved by the owner. The specifications also contain warranty requirements for the wall and roof panels.

Potts Contracting entered into a contract with McElroy Metal to supply the materials for the wall and roof panels. McElroy Metal supplied the materials to Potts Contracting but has never been paid for these materials. Defendants refused to pay McElroy Metal because the materials supplied by McElroy Metal do not conform to the project specifications. McElroy Metal delivered paneling made of AZ 50 Zinalume (Galvalume), but the specifications for the project require G-90 galvanized steel.

The issue in this case is whether the contract between Potts Contracting and McElroy Metal was for the purchase of G-90 galvanized steel. While McElroy Metal contends that Potts Contracting knew McElroy Metal was delivering Galvalume, Potts Contracting asserts that McElroy Metal was required to deliver G-90 galvanized steel under their agreement.

On March 16, 2005, plaintiff McElroy Metal brought this action against KBS, SAFECO, Potts Contracting, and R. A. Potts to recover the amount that McElroy Metal believes it is due for delivery of the materials.<sup>6</sup> McElroy Metal brings one claim against KBS and SAFECO for breach of payment bond. After McElroy Metal filed this lawsuit, KBS and Potts Contracting entered into a written agreement, on May 6, 2005, that allowed KBS to hold funds potentially owed by KBS to Potts Contracting on two separate construction projects pending the outcome of

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<sup>6</sup>While not relevant to KBS' and SAFECO's motion for summary judgment, the Court notes that McElroy Metal seeks recovery against Potts Contracting and Mr. Potts under the following theories: (1) breach of contract; (2) breach of personal guarantee; (3) request for attorney fees; (4) fee for weather tight warranty; and (5) *quantum meruit*. Additionally, Potts Contracting Group has brought counterclaims against McElroy Metal for: (1) breach of contract; (2) breach of implied warranty; and (3) specific performance.

this litigation. Subsequently, defendants KBS and Potts Contracting Group brought cross-claims against each other. KBS brings four cross-claims against Potts Contracting: (1) breach of the subcontract; (2) indemnification; (3) breach of written agreement; and (4) specific performance. Potts Contracting brings cross-claims against KBS under the following theories: (1) breach of contract; and (2) *quantum meruit*. KBS and SAFECO now move for summary judgment on all claims asserted against them as well as KBS' cross-claims against Potts Contracting.

## **II. Summary Judgment Standard**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”<sup>7</sup> A fact is only material under this standard if a dispute over it would affect the outcome of the suit.<sup>8</sup> An issue is only genuine if it “is such that a reasonable jury could return a verdict for the nonmoving party.”<sup>9</sup> The inquiry essentially determines if there is a need for trial, or whether the evidence “is so one-sided that one party must prevail as a matter of law.”<sup>10</sup>

The moving party bears the initial burden of providing the court with the basis for the motion and identifying those portions of the record that show the absence of a genuine issue of material fact.<sup>11</sup> “A movant that will not bear the burden of persuasion at trial need not negate the

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<sup>7</sup>Fed. R. Civ. P. 56(c).

<sup>8</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 251–52.

<sup>11</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

nonmovant's claim."<sup>12</sup> The burden may be met by showing that there is no evidence to support the nonmoving party's case.<sup>13</sup> If this initial burden is met, the nonmovant must then "go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."<sup>14</sup> When examining the underlying facts of the case, the Court is cognizant that all inferences must be viewed in the light most favorable to the nonmoving party and that it may not make credibility determinations or weigh the evidence.<sup>15</sup>

### **III. Discussion**

The Court will address in turn the three sets of claims on which defendants KBS and SAFECO move for summary judgment.

#### **A. *KBS' Cross-claims against Defendant Potts Contracting***

KBS brings claims against Potts Contracting for breach of the subcontract and breach of the written agreement. KBS further seeks indemnification and specific performance from Potts Contracting as a remedy.

#### **1. Breach of the Subcontract**

KBS claims that Potts Contracting breached the subcontract in three ways: (1) by failing to install certain materials as required by the specification; (2) by failing to pay its suppliers for materials used in the project; and (3) by failing to provide warranty documentation for

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<sup>12</sup>*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp.*, 477 U.S. at 325)).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

submission to the owner. Potts Contracting acknowledges that it has failed to perform under the subcontract, but argues that its performance is excused under the doctrine of impracticability.

“Impracticability of performance is a legal justification or excuse for nonperformance of a contractual obligation.”<sup>16</sup> “Whether a party should be excused from its obligations under a written agreement because of impracticability of performance is a question of law.”<sup>17</sup> Kansas courts recognize the difference between subjective (“I cannot do it”) and objective (“the thing cannot be done”) impracticability.<sup>18</sup> “Only objective impracticability may serve to relieve a party of a contractual obligation.”<sup>19</sup> The general rule with regard to subjective impracticability is that “[w]hen one agrees to perform an act possible in itself he will be liable for a breach thereof although contingencies not foreseen by him arise which make it difficult, or even beyond his power, to perform and which might have been foreseen and provided against in the contract.”<sup>20</sup>

The Court agrees with KBS that the facts in this case do not give rise to objective impracticability.<sup>21</sup> The dispute that arose between Potts Contracting and McElroy Metal did not create a situation in which “the thing cannot be done.” Nothing occurred to prevent Potts Contracting from purchasing and installing substitute materials that conformed to the

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<sup>16</sup>*Cent. Kan. Credit Union v. Mut. Guar. Corp.*, 102 F.3d 1097, 1102 (10th Cir. 1996) (citing Restatement (Second) of Contracts § 261 (1981)).

<sup>17</sup>*T.S.I. Holdings, Inc. v. Jenkins*, 924 P.2d 1239, 1248 (Kan. 1996) (citing *Sunflower Elec. Coop., Inc. v. Tomlinson Oil Co.*, 638 P.2d 963, 964 (Kan. Ct. App. 1981); Restatement (Second) of Contracts, Ch. 11, Introductory Note, p. 310 (1979)).

<sup>18</sup>*Id.* (citing *Freeto v. State Highway Comm’n*, 166 P.2d 728, 762 (Kan. 1946)).

<sup>19</sup>*Id.* (citing *Sunflower Elec. Coop.*, 638 P.2d at 970.)

<sup>20</sup>*Id.* (quoting *White Lakes Shopping Ctr., Inc. v. Jefferson Standard Life Ins. Co.*, 490 P.2d 609, 610 (Kan. 1971)).

<sup>21</sup>The Court notes that while Kansas courts recognize the doctrine of impracticability, no court has ever applied it. *T.S.I. Holdings*, 924 P.2d at 1248.

specifications from another supplier. Instead, the dispute with McElroy Metal gives rise to a subjective impracticability. The delivery of nonconforming materials was a contingency not foreseen by Potts Contracting which has made it difficult, even beyond its power, to perform its obligations under the subcontract; however, under the law, Potts Contracting is still liable for breach. Thus, the Court must grant summary judgment in favor of KBS on its cross-claim for breach of contract.

The Court recognizes Potts Contracting's argument that it was unable to avoid breach of the subcontract when McElroy Metal failed to submit materials that conformed to the specifications. Therefore, Potts Contracting argues that any liability it faces for breach of the subcontract should be passed on to McElroy Metal. While the Court understands Potts Contracting's argument, this is not an excuse for its breach of the subcontract under the terms of the agreement between Potts Contracting and KBS. However, the Court notes that if McElroy Metal is found liable to Potts Contracting for breach of contract, any damages that KBS claims against Potts Contracting can later be submitted as damages against McElroy Metal.

## **2. Indemnification**

KBS seeks indemnification from Potts Contracting. Under the terms of the subcontract, Potts Contracting agreed "to indemnify and hold harmless the Contractor from any claim, lien, judgment, court costs and expenses incurred on account of Subcontractor's failure to comply with the terms of this contract."<sup>22</sup> The construction and interpretation of a written contract is a matter of law for the court.<sup>23</sup> "In considering a contract which is unambiguous and whose

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<sup>22</sup>(Doc. 63, Ex. A at ¶ 1.7.)

<sup>23</sup>*Wagnon v. Slawson Exploration Co.*, 874 P.2d 659, 666 (Kan. 1994)).

language is not doubtful or obscure, words used therein are to be given their plain, general and common meaning, and a contract of this character is to be enforced according to its terms.”<sup>24</sup>

Because Potts Contracting breached the subcontract, it has failed to comply with the terms of the contract. Thus, under the plain and general meaning of the terms in the subcontract, KBS is entitled to indemnification. Potts Contracting responds that it is premature for the Court to order indemnification because the Court has not yet found KBS liable to plaintiff McElroy Metal. The Court agrees that indemnification is contingent upon such a finding of liability. Thus, the Court will conditionally grant summary judgment in favor of KBS on its indemnification claim, contingent upon whether KBS is found liable to McElroy Metal for damages.

### **3. Breach of the Subsequent Written Agreement**

KBS contends that Potts Contracting has breached the subsequent written agreement (“SWA”) by refusing to reimburse KBS for its attorney fees. The SWA, entered into by Daniel Foltz, President of KBS, and R. A. Potts of Potts Contracting, provides that Potts Contracting consents and agrees to allow KBS to withhold funds potentially owed by KBS to Potts Contracting on two separate construction projects.<sup>25</sup> Further, under the SWA, Potts Contracting agrees that KBS may disburse the funds to satisfy legal fees incurred by KBS as a result of litigation.<sup>26</sup> However, an award of attorney fees is limited under the agreement to \$500.<sup>27</sup> Thus,

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<sup>24</sup>*Id.* (citing *Darby v. Keeran*, 505 P.2d 710 (Kan. 1973)).

<sup>25</sup>(Doc. 63, Ex. G at 2.)

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*



under the plain meaning of this agreement, KBS is entitled to disburse such funds to cover \$500 of attorney fees. To the extent Potts Contracting objects to such disbursement, the Court finds they are in breach of the SWA. Therefore, summary judgment is granted in favor of KBS on this cross-claim as well.

#### **4. Specific Performance**

As a remedy for Potts Contracting's breach of the subcontract, KBS seeks specific performance. KBS requests an order requiring Potts Contracting to submit documentation that would allow the owner of the project to properly consider and approve the use of substituted materials and to submit warranties that conform to the warranty requirements for wall and roof panels as set out by the specifications. KBS contends that no monetary remedy under a breach of contract theory is adequate.

Potts Contracting responds that specific performance is not an appropriate remedy for breach of a construction contract.<sup>28</sup> "[C]ourts are generally reluctant to order specific performance of a construction contract."<sup>29</sup> Courts may not grant specific performance where there is an adequate remedy at law.<sup>30</sup> A remedy at law "must be as plain, adequate, complete and efficient as the remedy of specific performance and not circuitous or doubtful."<sup>31</sup> Here, the Court finds that specific performance is unnecessary because there is an adequate remedy at law. KBS has not shown that Potts Contracting's performance is unique, similar to performance of a

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<sup>28</sup>The Court is somewhat perplexed by Potts Contracting's argument against KBS' request for specific performance when Potts Contracting seeks specific performance from McElroy Metal as well.

<sup>29</sup>*Edward Kraemer & Sons, Inc. v. City of Overland Park*, 880 P.2d 789, 793 (Kan. Ct. App. 1994) (citing 13 Am. Jur. 2d *Building and Construction Contracts* § 112).

<sup>30</sup>*Miller v. Alexander*, 775 P.2d 198, 204 (Kan. Ct. App. 1989).

<sup>31</sup>*Id.* (quoting *Scott v. Southwest Grease & Oil Co.*, 205 P.2d 914, 915 (Kan. 1949)).

real estate contract, such that specific performance is required.<sup>32</sup> Rather, the Court finds that a money judgment in favor of KBS is an adequate remedy to compensate KBS for the breach of contract and to allow KBS to make any repairs to the renovation project, as the owner deems necessary, to conform to the specifications.

***B. Potts Contracting's Cross-claims against KBS***

Potts Contracting has asserted two cross-claims against KBS for breach of contract and *quantum meruit*. Potts contracting contends that KBS has withheld funds due to Potts Contracting on the Forbes Field Project as well as another project. However, KBS shows that the SWA, entered into by KBS and Potts Contracting, allows KBS to withhold funds owed Potts Contracting until the dispute between Potts Contracting and McElroy Metal is resolved.<sup>33</sup> Thus, because Potts Contracting entered into this SWA and under the general meaning of the terms of this agreement, Potts limited its right to payment, KBS is not liable for breach of contract for withholding these funds.

Further, KBS is not liable under a theory of *quantum meruit*. It is clear that *quantum meruit* may be asserted under the Miller Act where there is a breach of the contract.<sup>34</sup> “For it is an accepted principle of contract law, often applied in the case of construction contracts, that the

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<sup>32</sup>See, e.g. *Danciger Oil & Refining Co. v. Burroughs*, 75 F.2d 855, 858 (10th Cir. 1935) (“Equity decrees specific performance of a valid contract to sell real estate because land is *sui generis* and money damages for failure to perform are not adequate relief without reference to the quality or quantity of the land.”) (citations omitted).

<sup>33</sup>See Doc. 63, Ex. G at ¶ 5(a). “Potts hereby consents and agrees to allow KBS to use and disburse the Remaining Funds as necessary to satisfy any Project Costs incurred by Potts on the Project, including but not limited to, direct payment of the claims of McElroy Metal and Metal-Span, and legal fees incurred by KBS as a result of the Pending Claims, preparation of the Agreement and/or any future attorney’s fees or expenses incurred as a result of Potts’ failure to fulfill the terms and conditions of this Agreement and/or the Hangar Subcontract or Reserve Center Subcontract.” The term, “Remaining Funds,” is defined in the SWA as the balance owed to Potts Contracting on the Forbes Field Project and another project. (Doc. 63, Ex. G at ¶4(c).)

<sup>34</sup>*Southern Painting Co. of Tenn. v. United States ex rel. Silver*, 222 F.2d 431, 433 (10th Cir. 1955) (citing *United States ex rel. Susi Contracting Co. v. Zara Contracting Co.*, 146 F.3d 606, 610 (2d Cir. 1944)).

promisee upon breach has the option to forego any suit on the contract and claim only the reasonable value of his performance.”<sup>35</sup> Here, because KBS is not in breach of the contract, Potts Contracting is not entitled to recovery under a theory of *quantum meruit*. Thus, the Court grants summary judgment in favor of KBS on all of Potts Contracting’s cross-claims.

***C. Plaintiff’s Claim against KBS and SAFECO***

KBS and SAFECO move for summary judgment on plaintiff McElroy Metal’s claim for breach of payment bond. In order to succeed on its claim, McElroy Metal must prove that Potts Contracting breached the contract it had with McElroy Metal.<sup>36</sup> McElroy Metal has brought a breach of contract claim against Potts Contracting, and Potts Contracting has brought a counterclaim against McElroy Metal under the same theory. McElroy Metal contends that it delivered supplies to Potts Contracting for the Forbes Field Project, and it has not been paid the amount due. Potts Contracting responds that McElroy Metal is not entitled to payment because it delivered nonconforming materials. They further respond that McElroy Metal is not entitled to payment because it failed to provide the required warranty of panel performance and a warranty for the paint finish. Both parties have moved for summary judgment on these claims.<sup>37</sup>

On August 14, 2006, the Court held a status conference with the parties. At that conference, the Court orally denied the motions for summary judgment filed by McElroy Metal and Potts Contracting. The Court explained that there is a genuine issue of material fact that precludes the Court from granting summary judgment in favor of either party with respect to

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<sup>35</sup>*Id.* at 433–34 (quoting *Susi*, 146 F.3d at 610).

<sup>36</sup>*See* Pretrial Order. (Doc. 60 at 14.)

<sup>37</sup>(Docs. 61, 64.)

their breach of contract claims.<sup>38</sup> While McElroy Metal claims that Potts Contracting is liable for breach because it failed to pay McElroy Metal the amount due under the contract, Potts Contracting contends that McElroy Metal breached the contract by delivering nonconforming goods. McElroy Metal has provided some evidence that Potts Contracting knew that McElroy Metal was delivering Galvalume metal and that it was not McElroy Metal's responsibility to meet the requirements in the government specifications. But defendants have provided conflicting evidence showing that McElroy Metal was expected, under the terms of the agreement, to deliver G-90 galvanized steel as called for in the government specifications. Because this raises a genuine issue of material fact, the court orally denied McElroy Metal's and Potts Contracting's motions for summary judgment.<sup>39</sup> Likewise, the Court must also deny KBS' and SAFECO's motion for summary judgment on McElroy Metal's claim because there is a genuine issue of material fact as to one of the elements of McElroy Metal's breach of payment bond claim—whether Potts Contracting breached its contract with McElroy Metal.

#### **IV. Conclusion**

With respect to KBS' cross-claims against Potts Contracting, the Court grants KBS' motion for summary judgment on KBS' cross-claims for breach of the subcontract and breach of the subsequent written agreement. Further, the Court conditionally grants summary judgment in

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<sup>38</sup>Summary judgment was also denied with respect to McElroy Metal's other claims and Potts Contracting's other cross-claims, as the outcome of those claims relies on the factual resolution of the terms of their agreement and whether either party committed a breach of that agreement.

<sup>39</sup>In fact, the Court notes that defendants KBS and SAFECO also believe that this is a genuine issue of material fact that cannot be resolved on summary judgment. These defendants admit that "[t]he question of whether Subcontractor [Potts Contracting] knew about the material substitution is a disputed fact between Subcontractor [Potts Contracting] and Supplier [plaintiff McElroy Metal] . . . ." (Doc. 63 at 2.) "It would appear that a full trial is necessary to determine the responsibility and liabilities as it relates to the relationship between Subcontractor [Potts Contracting] and Supplier [plaintiff McElroy Metal]." (Doc. 63 at 19.)

favor of KBS on its indemnification claim contingent upon KBS being found liable to McElroy Metal. However, the Court denies KBS' request for specific performance because this is not an appropriate remedy for breach of a construction contract.

As to KBS' motion for summary judgment on Potts Contracting's cross-claims, the Court grants KBS' request and dismisses Potts Contracting's cross-claims against KBS for breach of contract and *quantum meruit*.

Finally, the Court has determined that because a genuine issue of material fact remains, the Court must deny KBS' and SAFECO's summary judgment motion with respect to plaintiff McElroy Metal's breach of payment bond claim.

**IT IS THEREFORE ORDERED** that defendants, Kansas Building Systems, Inc.'s ("KBS"), and SAFECO Insurance Company of America's ("SAFECO"), motion for summary judgment (Doc. 62) is **GRANTED IN PART AND DENIED IN PART**.

**IT IS SO ORDERED.**

Dated this 14<sup>th</sup> day of August 2006.

S/ Julie A. Robinson

**Julie A. Robinson**  
**United States District Judge**

*Memorandum and Order Granting in Part and Denying in Part defendants, Kansas Building Systems, Inc.'s and*

*SAFECO Insurance Company of America's Motion for Summary Judgment*, Case No. 05-4032-JAR.